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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 104

OAK WORSTED MILLS, *Petitioner*,

v.

THE UNITED STATES

BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

This is a suit brought by the petitioner, Oak Worsted Mills, in the Court of Claims to recover the amount of $8,003.08 (principal and interest), collected from it as an additional tax for the calendar year 1918, pursuant to a re-assessment made by the Commissioner of Internal Revenue, allegedly "to correct the excessive overassessment erroneously determined," after the expiration of the five-year period for collection prescribed by Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265. To the petitioner's cause of action the respondent relied on Section 611 of the Revenue Act of 1928, c. 852,

45 Stat. 791, 875, and the Court of Claims held (R. 32 et seq.) that the provisions of Section 611 are to be construed to defeat the right of the petitioner to sue and as so construed the provisions of the section are constitutional (36 F. (2d) 529, 38 F. (2d) 699).

This Court granted a writ of certiorari (50 S. Ct. 485, 281 U. S., 717) to review the decision of the court below and in granting the writ limited it to the question of the validity and effect of Section 611 of the Revenue Act of 1928.

I

OPINION OF THE COURT BELOW

The opinion of the court below was rendered by the Court of Claims on December 2, 1929, and a Supplemental opinion on February 17, 1930, in the case of this petitioner against the United States, No. J-180 on the records of that court. The opinions have been reported in 36 F. (2d) 529, 38 F. (2d) 699, and are a part of the record on this appeal (R. 28-52).

II

JURISDICTION

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(b) of the Act of February 13, 1925 (45 Stat. 936).

The date of the judgment of the Court of Claims sought to be reversed is February 17, 1930 (R. 44). The petition applying for the writ of certiorari was filed on May 7, 1930, and was granted June 2, 1930.

III

STATEMENT OF THE FACTS

The petitioner, a corporation, on June 16, 1919, duly filed its return for the calendar year 1918 and reported therein a tax of $91,994.37, which was paid in full during the year 1919.

On June 27, 1921, the petitioner filed a claim for refund, the basis of which claim was an application for assessment of profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918. The Commissioner of Internal Revenue determined the tax under the provisions of Sections 327 and 328 and found an overassessment in the amount of $26,487.97, which was made the subject of a certificate of overassessment bearing date of June 21, 1922, and which said sum was refunded to the petitioner.

On or prior to March 26, 1924, the Commissioner without the petitioner's knowledge or consent made a reexamination of the petitioner's application and on that date notified the petitioner that the previous determination of the tax was erroneous and that the total tax liability under Sections 327 and 328 was $79,262.44 and that an additional tax was due in the amount of $13,756.02 and shortly thereafter assessed the said amount. On April 12, 1924, and on notice and demand for payment the petitioner filed a claim in abatement in the amount of $13,756.02, on the grounds that the matter had become res judicata and was barred by the statute of limitations and by the provisions of the revenue acts then in force.

On February 11, 1925, the Commissioner made a further redetermination of the tax and notified the petitioner, by departmental letter (R. 30), that the com-

paratives used in his previous redetermination were erroneous and that the petitioner had been overassessed $6,345.76 and that the claim in abatement would be allowed for that amount and rejected for $7,410.26.

On June 1, 1925, the collector made demand for the payment of the said sum of $7,410.26. Thereupon the petitioner, in the District Court of the United States for the Eastern District of Pennsylvania, sought to enjoin the collector and the injunction was denied July 1, 1925, 6 F.(2d) 662. On August 27, 1925, the collector again made demand for payment of the said sum of $7,410.26, which, together with interest in the amount of $592.83, was paid September 10, 1925.

The pertinent dates, with summary of facts, in the instant case are as follows (R. 29-32):

June 16, 1919—return filed.

June 21, 1922—overassessment determined and refund made to petitioner.

March 26, 1924—reassessment of part of refund made.

April 12, 1924—claim in abatement filed, claiming matter res judicata.

June 16, 1924—expiration of five-year period for collection of tax.

February 11, 1925—second redetermination of overassessment made.

March 26, 1925—petitioner filed petition with Board of Tax Appeals and later dismissed for lack of jurisdiction.

June 22, 1925—petitioner applied for injunction against collector and later denied (6 Fed. (2d) 662).

September 10, 1925—tax collected.

February 15, 1928—claim for refund rejected.

April 4, 1928—petition filed Court of Claims.

IV

SPECIFICATION OF ERRORS

1. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 applied retroactively to cover the case of this petitioner.

2. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 was more than an administrative provision and that it was a withdrawal of the consent of the United States to be sued.

3. The Court of Claims erred in not holding that the petitioner acquired a vested property right and a vested right of action upon the expiration of the period of limitation, and in not holding that Congress did not have the power to pass subsequent legislation to deprive the petitioner of these rights.

4. The Court of Claims erred in rendering judgment in favor of the respondent.

V

THE QUESTIONS PRESENTED

The questions presented are, is Section 611 of the Revenue Act of 1928 (45 Stat. 791, 875) to be construed to take from the petitioner its right and title to an amount illegally collected from it as a tax after the statutory period for collection and to deprive it of a vested right of action which it otherwise would have to its recovery; and, if so construed, does the section violate the Fifth Amendment of the Constitution.

VI

THE ARGUMENT

The questions involved and the errors specified are the same as those involved and specified in the case of *Taft Woolen Company* v. *United States*, October Term, 1930, No. 105. Counsel for petitioner ask leave of the Court to refer to and adopt the argument made in the brief of counsel for petitioner in that case. Counsel also beg leave to refer to petitioner's brief in the case of *Percival E. Magee* v. *United States*, October Term, 1930, No. 65, to briefs of Amici Curiae filed in the case of *R. E. Graham and E. E. Foster* v. *Rex B. Goodcell*, No. 36, October Term, 1930.

The Collection Of No Part Of The Tax Was Stayed By The Claim In Abatement: The tax in this case was assessed March 26, 1924, prior to the enactment of the Revenue Act of 1924. Prior to the decision of this Court in the case of *Russell* v. *United States*, 278 U. S. 181, 48 S. Ct. 121, the Commissioner of Internal Revenue interpreted the provisions of Section 278(d) of the Revenue Act of 1924 (43 Stat. 299) to mean that he had six years in which to collect a tax assessed prior to the enactment of the statute. The petitioner submits that the Commissioner of Internal Revenue failed to make collection of the tax, not because a claim in abatement was filed, but because he labored under the erroneous impression that he had six years from the date of the assessment in which to make collection. (R. 27-28).

Article 1272 of Regulations 65 promulgated by the Treasury Department for the administration of the Revenue Act of 1924 and which the Commissioner followed in

this case with reference to Section 278 of that Act, reads in part:

> "If the tax imposed by the Acts enumerated above has been assessed within the four-year period or the five-year period as required by section 277(a) of the statute (see article 1271) a proceeding in court or distraint for the collection of such tax may be begun within six years after the assessment thereof."

The Commissioner consistently followed this practice and is a matter of general knowledge and one of which this Court can take judicial notice.

CONCLUSION

In conclusion the petitioner contends that Sections 607 and 611 of the Revenue Act of 1928 are administrative provisions affecting only the Commissioner of Internal Revenue; that they in no sense can be construed as a withdrawal by the United States of its consent to be sued; that upon the expiration of the time specified in the statute the petitioner acquired vested property rights, subject to the protection of the Fifth Amendment of the Constitution of the United States, and that it is beyond the power of Congress to affect those rights by any subsequent legislation.

Respectfully submitted,

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